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In the Supreme Court

OF THE

United States

OCTOBER TERM 1970

No.

BENJAMIN T. DELAHAY, JR., *Appellant,*

vs.

STATE OF ALASKA, et al., *Appellees.*

Appeal from the Judgment of the Supreme Court of Alaska

APPELLEES' MOTION TO DISMISS

Appellee, pursuant to Rule 16(1)(b) of the revised Rules of the Supreme Court of the United States, respectfully moves this Court to dismiss appellant's appeal on the grounds that the federal question sought to be reviewed was not properly raised or expressly passed on in the State Supreme Court and the appeal does not present a substantial federal question.

DUE PROCESS AND REPUBLICAN FORM OF GOVERNMENT QUESTIONS WERE NOT PROPERLY PRESENTED TO OR DECIDED BY THE ALASKA SUPREME COURT

Rule 11(a)(8) of the Alaska Supreme Court provides, in part, that briefs submitted to the Supreme Court shall contain:

> The argument, stating clearly the points of fact and of law being discussed, with reference to the page of the record and authorities relied upon in support of each point.

Based on this rule, the Alaska Supreme Court has consistently refused to decide issues that were not properly or adequately briefed. Thus, in the case of *Williams v. DeLay,* 395 P.2d 839, 847 (Alaska 1964) the Alaska Supreme Court said:

> On the last page and a half of their brief the appellants set forth three additional specifications of error, but they failed to support the errors specified by any clear explanation and argument or by any citation to authorities. We need not consider such specifications of error.

See *Weaver v. O'Meara Motor Co.,* 452 P.2d 87, 93 (Alaska 1969); *Isaacs v. Hickey,* 391 P.2d 449, 452 (Alaska 1964); *Watts v. Seward School Bd.,* 395 P. 2d 372, 376 (Alaska 1964); *Gregory v. Padilla,* 379 P.2d 951, 954 (Alaska 1963).

In appellant's initial brief, the entire argument relating to due process consisted of the following paragraph:

> Any interpretation of the statutes or provisions of the Alaska Constitution in question in relation to the issues herein, contrary to Appellant's right to continuation of his term as a District Court Judge, would be so contrary to the express language and intent of said constitutional and statutory provisions as to constitute an abuse of discretion to amount to deprivation to Appellant of due process of law as guaranteed by the Four-

teenth Amendment of the United States Constitution.

[File 3; App. Br. 38] Appellant reiterated this position on pages 21 and 22 of his reply brief but did not cite or discuss any cases or other authorities which would support his position. In disposing of his contention, the Alaska Supreme Court said:

> In his brief, appellant states in a single conclusory sentence, without citation or any authority, that a construction of the 1967 legislation upholding his dismissal would deprive him of due process. Even if appellant's reply brief could be considered, we find the argument on this point inadequate for resolution of appellant's novel constitutional claim. *Hoblit v. Greater Anchorage Area Borough,* 473 P.2d 630, 632 (Alaska 1970).

Delahay v. State, 476 P.2d 908, 912 (Alaska 1970) (note 22).

Appellant's argument relating to the guarantee of a republican form of government, as found on pages 38 through 42 of his brief, does not cite or discuss any cases arising under that provision. Rather, the appellant relied on numerous quotes from *The Federalist* to support his argument. In disposing of this contention the Alaska Supreme Court stated:

> It has long been the law that questions arising under the guarantee of a republican form of government are political, not judicial, which is to say that Congress decides whether a form of government is "republican". On the ground of nonjusticiability, the United States Supreme Court

> has refused to decide whether initiative and referendum, or delegation of legislative power to other branches violate the republican form of government guarantee. Since appellant makes no attempt to brief the effect of the case law construing the Guarantee Clause, we do not consider the point adequately raised, and do not reach it.

Delahay v. State, 476 P.2d at 912. Thus, the Alaska Supreme Court has *expressly* refrained from deciding the two federal constitutional questions presented by the appellant on the grounds that these questions were not properly raised.

Contrary to the position taken by appellant on page 2 of his jurisdictional statement, a federal question entitling appellant to direct review by this Court is not presented by the question of whether a failure of the lower court to consider a federal question was proper. Rather, that issue is merely part of the inquiry whether a federal question was presented to and passed upon by the State Supreme Court and is incidental to its determination. *Honeyman v. Hannun,* 300 U.S. 16, 18, 81 L.Ed. 476, 479 (1937). Generally, when the highest state court fails to pass upon a federal question, it is assumed by the Supreme Court that the omission was due to want of proper presentation in the state court unless the aggrieved party in this Court can affirmatively show to the contrary. *Street v. New York,* 394 U.S., 576, 22 L.Ed.2d 572, 579 (1969). While the issue of whether a federal question was sufficiently and properly raised in the state court is a federal question as to which the U.S.

Supreme Court is not bound by the decision of the state court, it would appear that state law is, in fact, applied when making this decision. Thus, in the case of *Wolfe v. North Carolina,* 364 U.S. 177, 195, 4 L.Ed.2d 1650, 1662 (1960), the court quoted from *John v. Paullin,* 231 U.S. 583, 585, 58 L.Ed. 381, 382 (1913) as follows:

> Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law. [Cases cited] . . . "[W]hen as here there can be no pretense that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this court accepts the decision whether right or wrong." *Nichol v. Cole,* 256 U.S. 222, 225, 65 L.Ed. 900, 905 . . .

Since the state supreme court has not passed on the federal questions urged and they were not properly presented to that court for decision, this Court is without jurisdiction to consider the question in the first instance.

THE DUE PROCESS ARGUMENT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

In effect, appellant contends that he has been deprived of due process of law by virtue of a court decision interpreting the Alaska Constitution in a manner which would not permit appellant's termination as a district judge under a law enacted by the Alaska Legislature. This Court has frequently held that a substantial federal question is not presented by a claim that the appellant is deprived of due process by virtue of an interpretation of a state statute or constitution by the highest court of the state. Thus, in *Ela[illegible] v. Colorado ex rel. Badgley,* 204 U.S. 85, 88-89, 51 L.Ed. 381, 385 (1907), this Court said:

> Indeed, under the circumstances disclosed, if there had been an assertion of a right, title, privilege, or immunity under the Constitution of the United States it would have been so frivolous as not to afford a basis of jurisdiction, since it is foreclosed that a mere contest over a state office, dependent for its solution exclusively upon the application of the Constitution of a state or upon a mere construction of a provision of state law, involves no possible federal question.

See *Nelson v. County of Los Angeles,* 362 U.S. 1, 6, 4 L.Ed.2d 494, 498 (1960); *Neblett v. Carpenter,* 305 U.S. 297, 302, 83 L.Ed. 182, 187 (1939); *Brinkerhoff-Faris Trust and Sav. Co. v. Hill,* 281 U.S. 679, 680, 74 L.Ed. 1113 (1930); *Preston v. City of Chicago,* 226 U.S. 447, 449, 57 L.Ed. 293, 295 (1913).

It is thus clear, plaintiff's contention that an interpretation of the Alaska State Constitution and a State statute by the Alaska Supreme Court does not present a substantial federal question which would vest jurisdiction over the matter in his Court.

THE REPUBLICAN FORM OF GOVERNMENT ISSUE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Although there have been few cases presented to the Supreme Court involving the construction of Article IV, Sec. 4 of the United States Constitution guaranteeing a republican form of government, the existing cases make it clear that a substantial federal question cannot exist under this clause. Thus in *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370, 374, 74 L.Ed. 913, 915 (1930), the Court said:

> No substantial federal question is presented under Sec. 4 of Article IV of the Federal Constitution guaranteeing to every state a republican form of government, as questions arising under this provision are political, not judicial in character.

Since the guarantee found in Sec. 4 of Article IV of the United States Constitution is political in nature, it is dependent for enforcement upon political and governmental action through powers conferred upon the Congress of the United States, and contentions relying on that clause present no justiciable controversy that is reviewable in the Supreme Court of the United States. *Pacific States Tel. & Tel. Co. v. Ore-*

gon, 223 U.S. 118, 150-151, 56 L.Ed. 377, 385-86 (1912); *Marshall v. Dye,* 231 U.S. 250, 256-57, 58 L.Ed. 206, 208 (1913).

CONCLUSION

It is clear from the contentions contained in plaintiff's brief and the cases cited in this motion to dismiss that the Supreme Court should not accept jurisdiction over this case.

Dated, Anchorage, Alaska,
March 29, 1971.

Respectfully submitted,
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